

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANA M. BAEZA)	
Claimant)	
)	
VS.)	
)	
NATIONAL BEEF PACKING CO.)	
Respondent)	Docket No. 187,168
)	
AND)	
)	
LUMBERMEN'S UNDERWRITING)	
Insurance Carrier)	

ORDER

This matter comes before the Workers Compensation Board on remand from the Court of Appeals in its unpublished decision in Docket No. 83,594, filed July 21, 2000. The Kansas Supreme Court denied a petition for review on December 20, 2000.

ISSUES

On October 23, 1998, the Administrative Law Judge awarded the claimant 32 weeks of temporary total disability but determined the claimant sustained no permanent partial disability. On June 29, 1999, the Board modified the Administrative Law Judge's award and determined that claimant was entitled to an award based upon a 35 percent work disability. The Court of Appeals determined that the claimant's subjective belief that she could not perform accommodated work was based upon discredited restrictions and accordingly was insufficient to establish good faith. The Court of Appeals concluded that the claimant's award must be based only upon her functional disability and remanded the matter to the Board for a determination of claimant's functional disability.

The parties have filed additional briefs in support of their respective positions regarding the issue of claimant's functional impairment.

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

Drs. Stringfellow, Brown, Schlachter and Murati all offered opinions regarding the extent of the claimant's functional impairment. Dr. Stringfellow provided treatment to the claimant for her work-related injuries. The respondent referred the claimant to Dr. Brown for an evaluation and rating. The Administrative Law Judge ordered an independent medical evaluation with Dr. Schlachter. The claimant's attorney referred the claimant to Dr. Murati for an evaluation and rating.

Dr. Stringfellow treated claimant from November 1993 through March 1994. At the first examination, November 11, 1993, claimant reported injury to both of her arms and shoulders. Following examination, Dr. Stringfellow concluded claimant had tendinitis affecting the left upper extremity more than the right. She recommended claimant limit her lifting to 20 pounds occasionally; limit stooping and bending to occasionally; limit her left hand grasping, pushing, pulling, and fine manipulations to never; limit the same activities on the right to occasionally; and no knife work.

Dr. Stringfellow next saw claimant on November 18, 1993. At this time, Dr. Stringfellow had the results from the nerve conduction studies which were normal. Claimant had the same symptoms at this visit, and Dr. Stringfellow recommended continuing the same restrictions.

Dr. Stringfellow saw claimant again on December 16, 1993. By this time, claimant had undergone physical therapy with little relief. Dr. Stringfellow concluded claimant had reached maximum medical improvement. Dr. Stringfellow scheduled an additional appointment for the purpose of an examination to determine the appropriate impairment rating.

But when Dr. Stringfellow saw claimant again on January 6, 1994, she ordered an MRI examination because claimant continued to complain of pain and loss of sensation. The MRI revealed a very mild bulging at C6-7 which Dr. Stringfellow considered to be a benign finding.

On March 2, 1994, Dr. Stringfellow did an examination for rating purposes. She found loss of motion in the cervical spine and right shoulder and reduced grip strength, especially for her dominant hand. Dr. Stringfellow assigned a 20 percent impairment rating to the right upper extremity, which she converted to 12 percent whole body, and 4 percent whole person for cervical problems. She combined these ratings to arrive at a 17 percent whole body impairment rating.

Dr. Brown saw claimant on April 27, 1994. He found some element of biceps or rotator cuff tendinitis and physical deconditioning of the musculature of the shoulders and trunk. The doctor noted an absence of crepitus on his examination. He considered some of the complaints to be unexplainable. He noted that the previous FCE was considered invalid and indicated gross exaggeration and possible malingering. Nevertheless, Dr. Brown assigned a 4 percent whole body impairment. But Dr. Brown also testified that if he

were going strictly by the *AMA Guides*, the impairment rating would be 0 percent because claimant had no loss of range of motion. He also recommended claimant avoid repeated use of her hands above shoulder level and avoid repeated use of the hands at waist level in an approximately two-foot radius.

Dr. Schlachter saw the claimant on August 1, 1994. The doctor noted the claimant's history is vague and her reported symptoms do not conform with the medical records. The doctor reported that claimant complained that her symptoms were worsening and she knew of no precipitating reason because all she does is cooking. The claimant complained of headaches, blurred vision when she looks down, dizziness and pain in her shoulders. Dr. Schlachter's physical examination of the claimant revealed full range of motion of the cervical spine although it was tender when touched, full range of motion of each shoulder without crepitus, and no rotator cuff weakness. The x-rays and MRI of the cervical spine were normal. The arthrogram of the right shoulder and x-rays of both shoulders were normal. Dr. Schlachter concluded the claimant only suffered from tension headaches. He further concluded there was no evidence of overuse syndrome, tendinitis, carpal tunnel syndrome or other work-related injury.

Dr. Murati saw the claimant on January 6, 1998. On examination, the doctor noted the claimant had full range of motion of the shoulders and cervical spine but that there was audible popping in the cervical spine with passive range of motion. The doctor diagnosed crepitus in both thumbs and elbows, cervical strain with a myofascial component and bilateral shoulder strain with a myofascial component. Dr. Murati assigned a .4 percent rating for each thumb for crepitus and 7 percent to each elbow for crepitus which combine for a 7 percent impairment to each upper extremity. The impairment to each upper extremity converts to a 4 percent whole person impairment for each upper extremity. In addition, the doctor assigned a 4 percent whole person impairment for the cervical strain. The impairments all combined for a 12 percent whole person impairment.

CONCLUSIONS OF LAW

The two doctors who examined the claimant most contemporaneously with the work-related injuries were Drs. Stringfellow and Brown. Both doctors concluded that the claimant had sustained a permanent functional impairment as a result of her work-related injury. Although Dr. Murati did not examine the claimant until January 6, 1998, he also determined that claimant sustained a permanent functional impairment to the whole body. Dr. Schlachter was the only physician who concluded the claimant had sustained no functional impairment as a result of her work-related accident.

Although Dr. Brown concluded that if he utilized the *AMA Guides*, the absence of a loss of range of motion would result in no assignment of impairment, he nevertheless rated the claimant with a 4 percent impairment to the whole body. Moreover, the doctor

imposed permanent restrictions against work which required repeated use of the hands above the shoulders.

Dr. Stringfellow concluded the claimant had sustained a 17 percent impairment to the whole body. The respondent contends that the opinion of the doctor was not based upon a reasonable degree of medical probability and should not be adopted. The following colloquy occurred during the deposition of the doctor:

Q. I can maybe repeat the question. I don't know if I can phrase it any differently. Can you state as of April 2, 1996, that Ms. Baeza's complaints of physical pain--and can you state within a reasonable degree of medical probability that her complaints of physical pain are directly related to her employment at National Beef where she had been off work for two years and two months?

A. No.¹

However, the doctor upon re-direct examination made the following comments:

Q. In your medical opinion--it is your opinion that her verbal complaints of pain, coupled with your physical examinations, were caused by the repetitive nature of meat cutting at National Beef?

MS. McQUEEN: Same objection.

A. Yes.²

The foregoing questions and answers concerning the origin of the claimant's complaints of pain do not equate to the position urged by the respondent that the doctor's opinion regarding the claimant's permanent functional impairment was not based upon a reasonable degree of medical probability. The doctor was not asked that question.

The examination by the court ordered physician, Dr. Schlachter, resulted in a finding of no permanent functional impairment. The doctor's conclusion was based primarily upon discounting the claimant's continuing complaints of pain. The Board accords less weight to the opinion of Dr. Schlachter because all of the other doctors concluded the claimant did sustain permanent impairment of function. In arriving at their determinations, the other doctors had to place credence in the claimant's continued complaints of pain.

¹ Deposition of Grace Lea Stringfellow, M.D., November 18, 1996; p. 51.

² Deposition of Grace Lea Stringfellow, M. D., November 18, 1996; p 55.

Dr. Murati's examination was conducted at a time so distant from the accident and with some findings inconsistent with claimant's contemporaneous complaints that the Board does not accord significant weight to the doctor's opinion regarding the claimant's permanent functional impairment.

A review of all the doctors' opinions results in the determination by the Board that more weight should be accorded the testimony of the only doctor that treated the claimant for her work-related injury. Dr. Stringfellow's rating is consistent with the claimant's complaints. Accordingly, it is the Board's determination that the claimant has met her burden of proof to establish that she sustained a 17 percent whole body impairment of function as a result of her work-related injury.

AWARD

WHEREFORE, an award of compensation is hereby entered in favor of the claimant, Ana M. Baeza, and against the respondent, National Beef Packing Company, and the insurance carrier, Lumbermen's Underwriting Alliance, for an accidental injury occurring on February 4, 1994.

The claimant is entitled to 32 weeks temporary total disability at the rate of \$221.81 per week or \$7,098.84 followed by 67.66 weeks at \$231.20 per week or \$15,642.99 for a 17 percent permanent partial general bodily disability making a total award of \$22,741.83 which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board members respectfully dissent from the majority decision and would affirm the Administrative Law Judge's finding that the claimant has failed to establish that she sustained any permanent impairment as a result of her work-related injury.

The consistent thread throughout the various medical records has been the absence of any objective findings to support the claimant's contentions. Dr. Stringfellow determined that claimant had sustained a loss of range of motion to her cervical spine as well as her right shoulder. The subsequent examinations performed by Drs. Brown, Schlachter and Murati did not confirm any loss of range of motion to the shoulders or cervical spine.

Drs. Stringfellow, Brown and Schlachter all noted inconsistencies in the claimant's complaints as well as symptoms that were unexplainable. The functional capacity evaluation was invalidated and indicated gross exaggeration and possible malingering. The arthrogram, x-rays, neurophysiology studies as well as the MRI were all normal.

Dr. Schlachter noted the inconsistencies and nonanatomical findings in Dr. Stringfellow's functional impairment rating. Dr. Schlachter found no evidence of overuse syndrome, tendinitis, carpal tunnel syndrome or any other work-related injury. Dr. Brown noted that if he utilized the required American Medical Association's, *Guides to the Evaluation of Permanent Impairment*, Third Edition, Revised 1990, the claimant could not be assigned a permanent impairment. Dr. Murati's findings were in portions of the claimant's body where there had not been contemporaneous complaints of pain.

In this case, the finding of the court ordered independent medical examiner that claimant did not sustain any permanent functional impairment should be adopted. We would affirm the findings of the Administrative Law Judge that as a result of her work-related injury the claimant suffered no permanent partial impairment of function.

BOARD MEMBER

BOARD MEMBER

pc: Lawrence M. Gurney, Attorney, Wichita, KS
Shirla R. McQueen, Attorney, Liberal, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director